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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re the Marriage of KURT ALLAN and TEDDI
PETERS.

KURT ALLAN PETERS,

Appellant,

v.

TEDDI PETERS,

Respondent.

F074525

(Super. Ct. No. MFL010951)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. D. Lynn Collet (formerly Jones), Judge.

Rusca & Rusca, Rosemarie E. Rusca and Christopher M. Rusca for Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Jerry D. Casheros and Gary A. Hunt for Respondent.

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In this marriage dissolution proceeding, appellant Kurt Allan Peters (Husband) contends the trial court erred in characterizing certain assets as community property rather than as his separate property and erred in various orders of reimbursement.

We conclude the trial court did not err in (1) characterizing Husband's ownership interest in Peters Property Management, a partnership, as community property; (2)

characterizing certain retirement accounts as community property; (3) concluding the community held a one-half ownership interest in a condominium with Husband's parents; and (4) finding Husband breached a fiduciary duty when he transferred all of the rents collected from the condominium's tenants to his parents.

We also conclude the trial court erred in (1) ordering Husband to reimburse the community for \$44,355 in capital contributions to Peters Property Management; (2) ordering Husband to reimburse the community for \$22,309.44 in community funds used to pay property taxes and insurance on his separate property, which the community used as the family residence for over seven years without paying rent; (3) ordering the community to reimburse respondent Teddi Peters (Wife) for \$17,594 in term life insurance premiums that she paid from her separate property after separation; (4) finding Wife's replacement wedding ring was entirely her separate property despite the application of \$12,500 in community funds towards its \$17,500 purchase price; and (5) determining Husband's claim for reimbursement of separate property funds invested in the residence awarded to Wife was \$214,880 instead of \$224,305.56.

We therefore reverse the judgment and remand for modification.

FACTS

Husband and Wife were married on August 3, 1996. The parties have one child, a daughter who turned 18 in June 2015. They separated on June 30, 2013, when Husband moved from the family residence. Following the separation, the daughter lived exclusively with Wife. Child support and spousal support are not issues in this appeal.

Husband was born around 1960. Husband and his brother began a lawn service business in high school and subsequently opened Peters Brothers Nursery, which included a nursery and landscaping business. Peters Brothers Nursery, Inc. was incorporated in 1988. On the advice of an attorney, the brothers formed Peters Brothers Landscaping, LLC in September 2005 to formalize the separation of the landscaping

activities from the nursery. The brothers also are equal owners of Peters Property Management, a partnership that operates a social hall on a parcel adjacent to the nursery.

Wife was born around 1966 and is a successful real estate agent. Wife was primarily responsible for handling the parties' financial affairs, both personally and for TK Farms, LLC, a company they formed in October 2010.¹ For example, Husband turned over his paycheck to Wife to pay the bills. Wife testified that she was "horrible on her accounts," used whichever checkbook she had to pay the bills, and she just put money where it was needed.

Once married, the parties maintained their residence at 26 Pointe West, Madera until late 2003 or early 2004. The house and lot were owned by Husband before the marriage and were his sole and separate property. Improvements were made to 26 Pointe West during the marriage using community funds. The trial court found the community contributed \$200,000 in value to the property's sale price of \$450,000. Wife was the real estate agent who handled the sale of 26 Pointe West and she did not receive her regular 5 percent commission on the transaction.

In November 2003, the parties purchased a lot on Via Cerioni in Madera for \$140,000. They made some payments on the note and then applied \$40,000 from a piece of property they sold. The balance of the amount owed on the lot was paid using \$96,209 provided by Wife's mother, Sharon Snyder, in July 2004.² The parties used \$425,000 of the proceeds from the sale 26 Pointe West for the construction of a community property residence on the lot.

For 10 months from when they moved out of the residence at 26 Pointe West until they moved into their new home on Via Cerioni, the parties lived in a condominium at

¹ TK Farms, LLC was formed for Wife's farming business and their daughter's swine project. The disposition of its assets and liabilities are not contested in this appeal.

² Husband does not challenge the trial court's determination that the entire \$96,209 was a gift to Wife as her separate property.

118 River Pointe. That property had been acquired by using Husband's parents funds they obtained from the sale of their rental property located on Sassafras Drive in Madera. The dispute over ownership of 118 River Pointe is discussed in part II.F., *post*. While residing in the River Pointe condominium, the parties provided benefits to Husband's parents of approximately \$935 per month. In addition, they paid association fees equaling approximately \$125 per month, property taxes, and insurance. Wife characterized these payments and benefits as a credit towards rent on the condominium, but the trial court ultimately found they were contributions towards an equity share in the property. The benefits were (1) improvements to the condominium that were paid for by the application of Wife's sales commission and (2) Husband working at his parent's carwash without collecting compensation of \$850 per month.

PROCEEDINGS

In March 2014, Husband filed a petition for dissolution of marriage. In November 2015, February 2016 and April 2016, a six-day bench trial was conducted. In May 2016, the parties submitted proposed statements of decision to the trial court. In June 2016, a hearing was held on the admission of additional exhibits.

The day after the hearing, the court issued its tentative statement of decision. Wife filed a response to the tentative decision and requested the clarification of one point and a few additions. Husband filed objections to the proposed statement of decision.

In July 2016, the trial court held a hearing on the objections to the tentative statement of decision. After argument from counsel, the court ruled on the objections and ordered Wife's counsel to prepare a statement of decision and a judgment.

In August 2016, the court filed a 48-page statement of decision. The same day, the court filed a judgment of dissolution terminating the parties' marital partnership status and setting forth the division of assets, property and liabilities. Husband timely appealed.

DISCUSSION

I. BASIC LEGAL PRINCIPLES

A. Characterization of Property

Characterization of property for purposes of California's community property law refers to the process of classifying property as separate, community or quasi-community. (*In re Marriage of Haines* (1995) 33 Cal.App.4th 277, 291 (*Haines*).) This classification process is necessary to determine the rights of each spouse and is an integral part of the division of property on marital dissolution. (*Ibid.*)

Family Code sections 760 and 770³ contain the principles for identifying community property and separate property. Section 760 defines community property by stating: "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." This statute creates "a general presumption that property acquired during marriage by either spouse other than by gift or inheritance is community property unless traceable to a separate property source." (*Haines, supra*, 33 Cal.App.4th at pp. 289–290.)

In comparison, section 770, subdivision (a) provides: "Separate property of a married person includes all of the following: [¶] (1) All property owned by the person before marriage. [¶] (2) All property acquired by the person after marriage by gift, bequest, devise, or descent. [¶] (3) The rents, issues, and profits of the property described in this section." This provision is based on the California Constitution, which states that "[p]roperty owned before marriage or acquired during marriage by gift, will or inheritance is separate property." (Cal. Const., art. I, § 21.) Under sections 760 and 770, it is well settled that the character of the property is fixed as of the time it is acquired and its character continues until it is changed in a manner recognized by law, such as by

³ All further statutory references are to the Family Code unless noted otherwise.

agreement of the parties. (*In re Marriage of Rossin* (2009) 172 Cal.App.4th 725, 732 (*Rossin*).)

The general community property presumption is rebuttable. “[V]irtually any credible evidence may be used to overcome it, including tracing the asset to a separate property source, showing an agreement or clear understanding between the parties regarding ownership status, and presenting evidence the item was acquired as a gift.” (*Haines, supra*, 33 Cal.App.4th at p. 290.)

B. Standard of Review

1. *Characterization of Property as Separate or Community*

Generally, the trial court’s findings of fact underlying whether a particular item is separate or community property is reviewed on appeal under the substantial evidence standard. (*In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 849.) In contrast, de novo review is appropriate where the determination of the character of an item of the property amounts to the resolution of a mixed question of law and fact that is predominantly one of law. (*Rossin, supra*, 172 Cal.App.4th at p. 734.) This situation arises where resolving the characterization issue requires a critical consideration, in an established factual context, of legal principles and their underlying values. (*Ibid.*) The standard of review that applies when the trial court determines a party with the burden of proof failed to carry that burden is discussed in part II.A.3., *post*.

2. *Reimbursement Claims*

Wife contends the trial court has broad discretion in resolving reimbursement claims and, therefore, its reimbursement determinations are subject to appellate review under the abuse of discretion standard. “The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court’s ruling under review. The trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is

reversible only if arbitrary and capricious.” (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712.) Where the challenged determination involves the trial court weighing various facts, the result of that weighing process generally will be upheld on appeal so long as the trial court’s decision falls within the permissible range of options set forth by the applicable legal criteria. (*County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 316.)

II. ISSUES RAISED ON APPEAL

A. Peters Property Management

1. *Facts*

Peters Property Management is a partnership formed by Husband and his brother as equal partners. Peters Property Management started doing business on September 1, 1996. It operates a social hall located on 1187 South Granada Drive in Madera (social hall property). This parcel of real estate is the primary asset used in the partnership’s business.

The social hall property is adjacent to 1135 South Granada Drive, the property used by Peters Brothers Landscaping, LLC and Peters Brothers Nursery, Inc. Husband testified that the social hall property was purchased for extra parking for the existing nursery business, though the building had office space that had been rented to two tenants and storage space.

A grant deed dated May 7, 1996, states Kapaar, Inc. grants “KEVIN PETERS, a married man, as his sole and separate property, as to an undivided one half interest and KURT PETERS, a single man, as to an undivided one half interest” in the social hall property. The grant deed was recorded on July 1, 1996, over a month before the parties were married. The names and manner in which title to the social hall property was held has not changed since the grant deed was recorded.

The partnership's 1996 federal tax return stated the partnership began the tax year with \$37,562 in building and other depreciable assets. The same amount was reported as its total assets and as the partners' capital accounts. By the end of the tax year, the partnership's total assets consisted of \$4,893 in cash and \$389,346 in buildings and other assets (less depreciation). The partnership's year-end liabilities and capital consisted of notes and mortgages of \$355,252 and partners' capital accounts of \$38,987. Thus, (1) total assets and (2) total liabilities and capital both equaled \$394,239. These increases in the partnership's assets and debts are consistent with the partnership becoming the owner of the social hall property, notwithstanding the fact that a deed was never recorded showing the brothers had transferred the property to the partnership.

2. Trial Court's Decision

The trial court addressed the question of when Husband acquired his interest in Peters Property Management (as distinct from acquiring ownership of the social hall property) by noting tax returns identified the date the business started as September 1, 1996, and a depreciation schedule identified the partnership's acquisition of both the land and building as October 1, 1996. The court rejected Husband's contention that the partnership was actively doing business prior to the marriage through renting out the social hall property for storage or parking, finding Husband had not met his burden to support his contention despite having access to the relevant information and documents. The court thus found the partnership business was acquired by Husband during the marriage and, thus, was presumptively community property.

The trial court then addressed the disputed issue of whether Husband or the partnership owned the social hall property. The court noted the distinction between an individual's interest in the assets held by the partnership and an individual's partnership interest, which is a type of personal property distinct from the partnership assets. The court found the partnership owned the social hall property because, among other things, it

had taken a deduction for depreciation on its tax returns. The court stated, “under California law, [the social hall property] is no longer separate or community property in and of itself. It is an asset of the partnership; it is that *partnership interest* which must be characterized as community or separate.”

Based on its determinations that the partnership owned the social hall property and that Husband’s interest in the partnership was presumptively community property, the court addressed whether Husband had overcome the presumption by demonstrating that all or part of his partnership interest was acquired with separate property. The court noted Husband “has provided inaccurate information regarding Peters Property Management at various points in this proceeding” and “obstructed efforts to obtain information related to the heart of the matter—who owned this business.” The court stated the failure to disclose had consequences, including the drawing of adverse inferences against Husband as the party who controlled the information. The court shifted the burden of proof to Husband and found “that he did not overcome these burdens at trial.”

Based on the foregoing analysis, the trial court concluded Husband’s interest in Peters Property Management was a community property asset. As further support for its finding that Peters Property Management started after the date of marriage, the court found there was a change in the business use of the real estate. Initially, the business was storage and parking, but subsequently the partnership was formed and started a new type of business (the social hall), which the court concluded was “additional support for the community character of the business.” At the hearing on objections to the tentative decision, the court stated it was “finding that there’s been a change in the Peters Property Management, which then makes that portion community property and subject to this Court’s division.”

Having determined that the entirety of Husband’s interest in Peters Property Management was community property, the court addressed the valuation of that interest.

The parties had stipulated that the value of 1135 South Granada and the social hall property was \$1,333,039. The land totaled 426,888 square feet, of which 175,547 (41 percent) was allocated to the social hall property. Of the 25,280 square feet of building, 11,840 square feet (47 percent) were of the social hall property. The testimony and report of a certified public accountant retained by Wife attributed \$586,376 of the stipulated value to the social hall property. The certified public accountant also calculated the value of the community interest in Peters Property Management at \$141,000 with debt and \$300,000 if the debt was ignored. The court adopted the valuation that took the debt into consideration and valued “the community’s interest in Peters Property Management at \$141,000.” Thus, to buy the community’s interest in Peters Property Management, Husband was required to pay the community \$141,000.

Despite finding that Husband’s 50 percent interest in Peters Property Management was community property, the court also found that the community had contributed \$44,355 as additional paid-in capital funds to the partnership during the marriage and ordered Husband to reimburse the community for those capital contributions. Wife’s accountant prepared comparative historical balance sheets for Peters Property Management that set forth year-end figures for 2004 through 2014, inclusive. Line 12 of the balance sheets was labeled “Improvements,” a specific entry under the broad category of “Fixed Assets.” The amount of improvements listed for the end of 2004 and 2005 was \$44,355. The court stated the accountant’s tracking of the records confirm that this sum was contributed during the marriage.

3. Failure to Carry Burden of Proof

When a trial court frames its determination by stating a party did not carry its burden of proof, the appellate court does not apply the substantial evidence standard to the trial court’s failure-of-proof determination. The Fifth District has addressed the standard of review applicable to a trial court’s failure-of-proof determination in a variety

of contexts over the past decade. Three of the cases have been published. (See *Wells Fargo Bank, N.A. v. 6354 Figarden General Partnership* (2015) 238 Cal.App.4th 370, 390; *Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 (*Dreyer's*); *Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 965.) “[W]here the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) “uncontradicted and unimpeached” and (2) “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” [Citation.]’ [Citation.]” (*Dreyer's, supra*, at p. 838.)

Here, Husband fails to meet the first prong of the test because his evidence was not uncontradicted and unimpeached. The statement of decision described Husband’s obstruction of efforts to obtain information about Peters Property Management and described inconsistencies in the testimony he presented. As a result of the inconsistencies, his testimony was contradicted and impeached. (See Evid. Code, § 780, subd. (h) [prior inconsistent statement as a factor in determining witness credibility].)

In addition, the evidence Husband presented left room for a judicial determination that it was insufficient to support a finding that part of the value of his ownership interest in the partnership was traceable to a separate property contribution. The trial court recognized that Husband acquired the social hall property prior to his marriage. Consequently, there is no question that his contribution of the property to the partnership should be regarded as a contribution of separate property. As a result, the relevant question is what was the value of Husband’s separate property interest in the real estate when it was contributed to the partnership. Based on the 1996 tax returns of the partnership, we conclude the trial court was not compelled to find Husband’s separate property interest had a positive value.

The 1996 federal income tax return of Peters Property Management shows the partners' capital accounts at the beginning of the tax year (i.e., when it started doing business) was \$37,562. At that point, the partnership had no liabilities and its capital was reported as \$37,562. By year end, the partnership held \$4,893 in cash and \$389,346 in buildings and other depreciable assets, less depreciation. Debt against the property was listed at \$355,252. The court reasonably could find the figure for buildings was due to the contribution of the social hall property to the partnership. The partners' capital accounts had grown to \$38,987 by the end of 1996, which represented an increase of \$1,425 from the beginning of the tax year. This increase in the capital accounts corresponds exactly to the income reported by the partnership for the tax year. Consequently, the small increase in the partners' capital accounts achieved during its first four months of operation is solely the result of income, not to the contribution of additional assets by the partners. In these circumstances, the court reasonably could find Husband's contribution of his one-half interest in the real estate to the partnership did not increase the value of his partnership interest. Stated another way, it appears the value of the social hall property was offset by the debt undertaken by the partnership.

Accordingly, we conclude Husband has not demonstrated the trial court was compelled to find that he proved some or all of the value of his partnership interest was traceable to his separate property interest in the social hall property. Furthermore, Husband's argument that he "was entitled to reimbursement for 50% of [the social hall property] at the time of contribution (i.e. \$185,702.50) under section 2640" fails to acknowledge the debt undertaken by the partnership. Husband has cited no authority for the argument that the value of the property should be calculated without reference to the debt that encumbers it.

4. *Reimbursement of Capital Contributions*

Husband also contends that, assuming his interest in Peters Property Management was entirely community property, the community was not entitled to reimbursement for contributions of \$44,355. Husband argues that *Weinberg v. Weinberg* (1967) 67 Cal.2d 557, addresses the reimbursement of separate property used to pay a community expense, which is distinguishable from the contribution of community property funds to a business characterized as community property. In Husband's view, "the spouse receiving the community business is unfairly charged twice; once for the value of the business (which includes the capital contributions from the community estate) and a second time for the contribution." We agree that Husband was charged twice for the same thing and will vacate the order that Husband reimburse the community for the \$44,355 in capital the community contributed to the partnership.

The documents prepared by Wife's accountant to demonstrate the value of the partnership interest held in Husband's name (which include trial exhibits 3.1a and 3.2) establish that the \$44,355 in improvements made by the end of 2004 were included in the value of total assets, adjusted to December 31, 2014,⁴ a figure used to calculate the value of the community interest in the partnership. The corrected amount of total assets, adjusted to December 31, 2014 (line 20 of trial exhibit 3.1a), is \$600,410. This figure for total assets was reduced by total liabilities of \$318,886 (line 33) to obtain the total equity of \$281,524 (line 41). Total equity equaled the figure for the partnership's "Adjusted net tangible assets" appearing on line 46 of trial exhibit 3.1a—the figure that was rounded to

⁴ The figures contained in the version of trial exhibit 3.1a included in the appellate record contain an error. On line 10, the number 746,933 appears in the "Increase" and the "Adjusted 12/31/2014" columns. This number is the value attributed to 1135 South Granada, which is not the property used by the partnership. The proper number is the value attributed to the social hall property, which is, \$586,376. With this correction, the figure for total assets, adjusted to December 31, 2014, (line 20 of trial exhibit 3.1a) is \$600,410; the figure for "Adjusted net tangible assets" (line 46) is \$281,524; and the figure for the community's one-half interest, when rounded, equals \$141,000.

\$282,000 (line 48) and then divided in half to obtain \$141,000 as the value of the community interest in the partnership (line 49). It was necessary to divide \$282,000 in half because the community owned a 50 percent interest in the partnership and Husband's brother held the other 50 percent. The foregoing demonstrates that the value of the improvements made by the end of 2004 were part of the partnership's total assets and, therefore, part of its total equity. Requiring Husband to reimburse the community for the community property interest in the partnership, the value of which was based on the partnership's total equity, and also requiring Husband to reimburse the community for a contribution to the partnership's capital provides for a redundant recover because the contribution to capital was among the assets used to determine the value of the community property interest.

In summary, the order that Husband reimburse the community \$141,000 for the community's ownership interest in the partnership will be upheld and the order requiring Husband to reimburse the community \$44,355 for capital contributions to the partnership will be vacated.

B. Reimbursement of Property Taxes and Homeowners Insurance

The trial court found community funds were used to pay property taxes and homeowners insurance premiums on 26 Pointe West. From August 1996 through March 2004—the period during which the parties used the property as their home—the community paid (1) a total of \$16,100.16 in property taxes (i.e., slightly more than \$2,000 per year); (2) \$5,880 in premiums for homeowners insurance; and (3) \$329.28 in taxes to the Madera Irrigation District. The court found it was appropriate for Husband to reimburse the community in the amount of \$22,309.44 because 26 Pointe West was Husband's separate property.

Husband contends the community was not entitled to reimbursement of the property taxes and homeowners insurance premiums because the community benefited

from the payments. In particular, Husband argues Wife benefited from the property taxes by living in the house rent free and benefited from the protection provided by the insurance, including making a claim and receiving a \$5,000 payment for the loss of her wedding ring. Husband distinguishes the cases relied upon by the trial court on the ground those cases involved property tax payments on investment real estate and not property used as the family residence.

We agree and conclude that the cases of *Somps v. Somps* (1967) 250 Cal.App.2d 328 and *Estate of Turner* (1939) 35 Cal.App.2d 576 do not stand for the principle that the community must be reimbursed for property tax and homeowners insurance premiums paid on separate property used rent free as the family residence. Instead, those cases involve investment real estate held as separate property by husbands who used community funds to pay the taxes and expenses, a situation in which the community or the wife did not benefit from the payment of taxes and insurance. (*Somps v. Somps*, *supra*, at p. 338; *Estate of Turner*, *supra*, at p. 578.) The rationale for requiring reimbursement of those expenditures of community funds was stated as follows:

“To hold that the surviving wife should not recover moneys paid out by her husband as head of the community and as manager of the community estate for the protection of his separate estate would operate to her loss in all cases where his collateral heirs assert their rights of heirship because of his intestacy. Innumerable situations may occur where the husband has no income but his salary, which is community, while his unimproved separate properties require enormous outlays of money for taxes to say nothing of the endless assessments for public improvements. The entire community income over a period of years would be consumed in conserving the titles to his properties by the expenditure of community funds, only to leave the surviving widow a beggar at his grave with his collateral kindred demanding their portions of his ‘separate estate.’” (*Estate of Turner*, *supra*, at p. 580.)

This rationale does not apply to a situation where (1) a separate property house is provided as the family residence, (2) the community pays no rent for the residence, and (3) the nonowner spouse handles the family’s finances. At the time of death or

separation, the nonowner spouse will not be left a beggar because of the outlays of community income for taxes and insurance. Instead, the payment of those expenses and the availability of a rent free residence will have placed the nonowner spouse in a better financial position than he or she would have had if the separate property was not used by the community's residence.

In the context of the determining the community's equity interest in a separate property residence, our Supreme Court addressed the relationship between the payment of taxes and insurance and charges for the use of the separate property residence. The court stated that if payments made for taxes and insurance were considered part of the community interest, then "fairness would also require that the community be charged for its use of the property." (*In re Marriage of Moore* (1980) 28 Cal.3d 366, 372–373; see *In re Marriage of Nelson* (2006) 139 Cal.App.4th 1546, 1554–1556 [trial court erred in factoring rental value into the *Moore/Marsden* calculation].)⁵ This view of fairness supports the conclusion that a community that uses separate property and is not charged for its use should not be reimbursed for paying property taxes and insurance expenses related to that property—payments that do not add to the equity of the property.

Consequently, we conclude the trial court erred in determining the community was entitled to reimbursement in the amount of \$22,309.44 for tax and insurance payments related to 26 Pointe West. Based on this conclusion, we need not address Husband's argument that the time limit stated in section 920 bars the reimbursement claim for the tax and insurance payments.

⁵ When community funds are used to reduce the principal balance of a mortgage on one spouse's separate property, the community acquires a pro tanto interest in the property. This principle is known as the *Moore/Marsden* rule. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1421–1422; see *Moore, supra*, 28 Cal.3d 366; *In re Marriage of Marsden* (1982) 130 Cal.App.3d 426.)

C. Life Insurance Premiums

1. *Background*

During their marriage, the parties obtained term life insurance on Husband's life through Phoenix Life and on Wife's life through State Farm. Wife was the beneficiary of the life insurance policy on Husband; their daughter was the beneficiary of the life insurance policy on Wife. After separation, Wife paid the premiums on both policies out of her postseparation real estate earnings. She made eight payments of \$1,397 every three months on the policy insuring Husband's life and then the policy lapsed in June 2015. The premiums on the policy insuring Wife's life were \$194.50 per month, and she paid them every month through the date of the trial court's decision, totaling \$6,418.

The trial court determined Wife was entitled to an *Epstein*⁶ credit of \$11,176 for the payments made on the policy insuring Husband's life and a credit of \$6,418 for the payments made on the policy insuring her life. The total credit was \$17,594.

2. *General Principles*

California statute provides that both spouses have an equal interest in community assets. (§ 751.) Trial courts are required to “divide the community estate of the parties equally” upon a dissolution of the marriage. (§ 2550.) Generally, debts incurred after the date of marriage but before the date of separation also must be divided equally. (§ 2622, subd. (a).) After separation, when separate property is used to pay a preexisting community obligation, the matter of reimbursement lies within the court's discretion. This discretion is to be exercised in accordance with the equitable considerations developed by case law—considerations that have been called the “*Epstein* guidelines.” (2 Hogoboom, et al., Cal. Practice Guide: Family Law (The Rutter Group 2018) ¶ 8:844, p. 8-305; see *Epstein, supra*, 24 Cal.3d at pp. 84–85.) Fundamentally, the *Epstein* guidelines address situations where the facts render it unfair or unreasonable for the party

⁶ *In re Marriage of Epstein* (1979) 24 Cal.3d 76 (*Epstein*).

who made the payment to expect reimbursement. (2 Hogoboom, et al., Cal. Practice Guide: Family Law, *supra*, ¶ 8:845, p. 8-306.) Under those guidelines, reimbursement is inappropriate “where the spouses agreed there would be no reimbursement; where the spouse intended a gift; where payment was made toward a debt for the acquisition or preservation of an asset the spouse was using and the amount paid was not substantially in excess of the value of the use; where the payment constituted a discharge of the spouse’s duty to pay child or spousal support.” (*In re Marriage of Reilley* (1987) 196 Cal.App.3d 1119, 1123.)

Generally, whether to award reimbursement for postseparation expenses paid from separate property and the amount of the reimbursement is committed to the trial court’s discretion. (*In re Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 1272.) Discretionary authority, however, must be exercised within the confines of the applicable legal principles. (*In re Marriage of Morton* (2018) 27 Cal.App.5th 1025, 1050.)

3. *Principles for Characterizing Term Life Insurance*

In *In re Marriage of Burwell* (2013) 221 Cal.App.4th 1, this court recognized that the coverage and premium provisions of term life insurance policies provide dollar coverage only for the specific term for which the premium was paid. (*Id.* at p. 17.) As a result, we concluded the characterization of any term life insurance proceeds depends on the source of the premium for the final term of the policy—that is, the term during which the death occurred. (*Ibid.*) Based on this conclusion, we stated the proceeds of a term life policy are community property when the final premium is paid solely with community property and, conversely, the proceeds are a separate asset when a separate estate pays the final premium. (*Ibid.*) In accordance with these principles, if Husband would have died during the postseparation period when Wife was paying the Phoenix Life premium, the proceeds would have been characterized as her separate property, not

community property. Similarly, no community property interest would have arisen in the proceeds from the State Farm term policy insuring Wife's life.

4. *Community's Obligation to Pay Life Insurance Premiums*

The principles set forth in *Epstein* address the payment of preexisting community obligations with separate funds after separation. Here, the community was not *obligated* to pay the life insurance premiums in the sense that a failure to pay the premiums would have resulted in debts owed to the insurance companies and, consequently, possible collection actions. (See *In re Marriage of Hebring*, *supra*, 207 Cal.App.3d at p. 1271 [reimbursement appropriate where payment of obligation benefits both spouses by avoiding a collection action, foreclosure or repossession].) Instead, the failure to pay the premiums on the term life insurance policies would have resulted in the loss of coverage. Accordingly, the life insurance premiums paid by Wife in this case cannot be classified as the type of obligation addressed in *Epstein*—that is, a preexisting community obligation. Also, if Husband died during period that Wife paid the Phoenix Life premiums on the term life insurance policy covering his life, the death proceeds would have been characterized as Wife's separate property pursuant to the principle recognized by this court in *In re Marriage of Burwell*, *supra*, 221 Cal.App.4th 1. Thus, Wife's payments of the life insurance premiums are comparable to a payment made on account of a debt for the acquisition or preservation of an asset the payor was using, not an asset of benefit to both spouses. In these circumstances, it would be unfair or unreasonable to require Husband to reimburse Wife for the life insurance premiums paid from her separate property.

Wife cites section 2040 to support her argument that she was under the authority of an automatic temporary restraining order upon being served with the summons and, thus, she was obligated to pay the insurance premiums. Section 2040, subdivision (a) provides that the summons in a marriage dissolution proceeding shall contain an

automatic temporary restraining order. Under that order, both parties are restrained “from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability, held for the benefit of the parties and their child or children for whom support may be ordered.” (§ 2040, subd. (a)(3).) Husband argues this provision does not require payment of premiums, but merely forbids the acts listed. We agree. The plain wording of the statute prohibits a party from taking the specified actions, it does not compel the party served to take action. (See 6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, §§ 278 [prohibitory injunction requires a person to refrain from a particular act], 280 [mandatory injunction compels an act]; *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 527 [mandatory and prohibitory injunctions].) Furthermore, Wife has cited, and we have located, no case rejecting a literal reading of section 2040 and interpreting it to compel the payment of insurance premiums on a term life insurance policy. Accordingly, based on the plain language of the statute and the absence of contrary authority, we conclude section 2040 did not impose a statutory obligation on Wife to continue making payments on the term life insurance policies. Under this interpretation, the statute does not bring Wife’s premium payments within the scope of the principles set forth in *Epstein, supra*, 24 Cal.3d 76.

Therefore, Wife is not entitled to an *Epstein* credit of \$17,594 due to her payment of term life insurance premiums. On remand, the trial court shall modify the judgment to eliminate the credit.

D. Retirement Accounts

1. *Husband’s Contentions*

Husband contends the trial court made an error of law or abused its discretion when it determined all of Husband’s retirement accounts were community property. Husband claims the undisputed evidence establishes that \$184,445.67 had been deposited

into two of his retirement accounts prior to the marriage and all evidence was that no money was withdrawn during the marriage. Both accounts were opened with ITT Hartford Life Insurance Company (Hartford); one account number ended with 794 (Account 794) and the other account number ended with 257 (Account 257). Under Husband's view of the evidence, the part of the judgment stating the retirement accounts were community property should be set aside with directions to the trial court that at least \$184,445.67 in the accounts be confirmed as Husband's sole and separate property.

2. Trial Court's Decision

The trial court found that Account 794 was funded in February 1996 with a \$60,000 check from Husband's mother and was increased with a June 1996 check for \$40,000. These funds were paid to Hartford before the August 3, 1996, marriage. At the time of trial, Hartford was no longer the company holding Account 794. The court noted that Husband, through his financial planner, Robert Barber, attempted to establish that the funds from Account 794 were held in a Met Life account with a balance of \$119,496 as of March 31, 2015. The court stated that Husband's "effort at tracing is insufficient to demonstrate that these monies [(i.e., the \$100,000 deposited into Account 794)] remained and are currently held in his Metlife account." The court stated Husband had not provided an adequate trail from the Met Life account to Account 794 with Hartford because (1) he provided no documentation showing the monies originally in Account 794 were not withdrawn and (2) he did not establish that no additional sums of money were deposited into Account 794 or into the subsequently purchased Met Life Account. In addition, the court stated:

"Mr. Barber acknowledged that there were other transfers into this MetLife account. [Citation.] What has been established is that the MetLife account was funded in 2003, during the marriage. [Citation.] Petitioner Husband, Kurt Peters has not provided sufficient evidence to establish that the funds deposited in 2003 or thereafter were derived from a separate property source."

The court also stated that Husband “has been obstructive and evasive with regard to discovery related to this and his other accounts.” For instance, his responses to written discovery only disclosed an individual retirement account at Union Bank even though he was getting statements on all of his accounts. The court reiterated its determination that Husband had “not met his burden to trace the holdings of the MetLife account funded during the marriage to a separate property source” and found the MetLife account was community property, awarding it to Husband at a value of \$119,496.

3. *Analysis*

Husband’s attempts to establish trial court error fall far short. His opening brief did not accurately state the basis for the trial court’s decision—namely, that Husband failed to provide sufficient evidence to trace the funds from the accounts opened with Hartford to accounts maintained at MetLife at the time of trial. Having failed to acknowledge the tracing issue, Husband also failed to acknowledge the gaps in the records and testimony presented. Filling the documentary gaps would be essential to showing the trial court’s failure-of-proof determination was error. As previously described, a failure-of-proof determination will be upheld on appeal unless the appellant’s evidence was ““(1) “uncontradicted and unimpeached” and (2) “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” [Citation.]’ [Citation.]” (*Dreyer’s, supra*, 218 Cal.App.4th at p. 838.) Here, Husband has failed to meet this standard because the account records are incomplete and the trial court impliedly found the testimony of Husband and his financial adviser about the accountants was inadequate (partially due to credibility issues). In other words, the evidence presented was not of such a character and weight as to leave no room for a judicial determination as to whether the required tracing had been proven. Accordingly, we conclude Husband has not demonstrated the trial court erred in concluding the various retirement accounts were community property.

E. Replacement Wedding Ring

1. *Background*

The parties agree that Husband gave Wife a wedding ring when they got married and it was her separate property. Sometime during the marriage, the wedding ring was lost. The loss of the ring was covered by a homeowners insurance policy, which paid \$5,000. A replacement wedding ring cost \$17,500.

Husband concedes that \$5,000 of the cost of the replacement ring is properly characterized as separate property. He argues community funds were used to pay the additional \$12,500 in cost and, therefore, that portion of the ring is properly characterized as community property.

The trial court's decision stated the court did not find Husband's position persuasive, found "that the ring was intended as a gift, and award[ed] it to ... Wife ... as her sole and separate property." Section 9.0 of the judgment confirmed that the replacement wedding ring was Wife's separate property and the community held no interest in it.

2. *Husband's Contentions*

Husband challenges the trial court's characterization of the replacement wedding ring as Wife's separate property on two grounds. First, Husband contends the ring was personal property acquired with \$12,500 in community funds and an express, written declaration changing the character of the personal property was required by subdivision (a) of section 852. He argues the exception to the writing requirement contained in section 852, subdivision (c) does not apply because the \$12,500 was substantial in value. (See *In re Marriage of Steinberger* (2001) 91 Cal.App.4th 1449 [writing requirement applied to diamond ring because trial court found it was substantial in value].) Second, Husband contends the \$12,500 in community funds were not transmuted to Wife's separate property by way of a gift because there is no evidence he intended to make a gift.

3. *Section 852 and Gifts of Personal Property*

Generally, “all property ... acquired by a married person during the marriage ... is community property.” (§ 760.) However, the law allows married persons to transmute their community property to separate property of either spouse by agreement or transfer. (§ 850, subd. (a).) In 1984, the California Law Revision Commission reported that existing law made it easy for spouses to transmute real or personal property through oral statements or conduct and the lack of formal requirements had generated extensive litigation in dissolution proceedings. (*In re Marriage of Bonvino* (2015) 241 Cal.App.4th 1411, 1428.) The informality encouraged a spouse to argue a passing comment was an agreement to transmute property and also encouraged perjury about oral or implied transmutations. (*Ibid.*) To address the problem of unreliable evidence in transmutation cases, the Legislature adopted the requirements now contained in sections 850 through 853. (*Bonvino, supra*, at p. 1428.) Subdivision (a) of section 852 requires transmutations of personal property to be in writing. Subdivision (c) of section 852 states the requirement for an express writing “does not apply to *a gift* between the spouses of ... jewelry” that is not substantial in value and meets the other statutory condition. Here, if there was no gift by Husband of the \$12,500 in the first place, this exception to the writing requirement would not result in the transmutation of those community funds, or the portion of the ring acquired with those funds, into Wife’s separate property. Consequently, we first consider whether the evidence is sufficient to support the trial court’s finding of a gift.

Gifts of personal property are addressed in Civil Code sections 1146, 1147 and 1148. Civil Code section 1146 states: “A gift is a transfer of personal property, made voluntarily, and without consideration.” Civil Code section 1147 states: “A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.” Civil Code section 1148 states: “A gift, other than a gift in view of

impending death, cannot be revoked by the giver.” Based on these statutory provisions, California case law defines the elements of a gift as “(1) competency of the donor to contract; (2) a voluntary intent on the part of the donor to make a gift; (3) delivery, either actual or symbolical;[⁷] (4) acceptance, actual or imputed; (5) complete divestment of all control by the donor; and (6) lack of consideration for the gift.” (*Jaffe v. Carroll* (1973) 35 Cal.App.3d 53, 59.) Whether a transfer of personal property satisfies these elements presents questions of fact. (*Burkle v. Burkle* (2006) 141 Cal.App.4th 1029, 1036 [whether transfer of funds was a gift or loan depended principally upon transferor’s intent at the time he advanced the funds]; see *In re Marriage of Frick* (1986) 181 Cal.App.3d 997, 1015.)

Husband contends Wife went to the jewelry store in Sacramento by herself, picked out the ring, and paid for it. He testified, “I did not give it to her, she went and purchased it.” In November 2015, Wife testified about getting money from the insurance claim for the lost ring and then stated: “And then we went to a gentlem[a]n that was going out of business in a jewelry store in Sacramento. Barbara Basila told me about it and so I told [Husband] so that was my replacement.” In February 2016, after Wife again described getting the insurance money, the following exchange took place:

“Q And then from there, did—did you get anything from [the insurance proceeds]?

“A We bought a new one.

“Q A new what?

“A A new wedding ring.

⁷ A common type of symbolic delivery involves the handing over of keys to a chest, bureau, trunk or safety deposit box containing the personal property that is being transferred. (38 C.J.S. (2018) Gifts, § 111 [constructive or symbolic delivery]; see *Schuler v. Winstanley* (1956) 141 Cal.App.2d 759, 767 [delivery of keys to garage was not symbolic delivery of copyrights and manuscripts contained in garage].)

“Q And, in your mind, was that—what was that? Was that a replacement for your old ring? What was it?

“A It was a gift. It was my wedding ring.”

On cross-examination, Wife stated that they did not go and pick out the ring together as Husband did not take time off from work and that she picked the ring out herself, which was a white gold band with a diamond.

Wife did not explain why she believed the value beyond the insurance proceeds was a gift and not an investment made by the community. For instance, Wife did not testify as to anything Husband said about the ring, either before or after she purchased it. Thus, there is no evidence of an oral statement expressing Husband’s intent to make a gift.⁸ To the extent that donative intent might be implied by action, Husband’s role in the acquisition of the replacement ring was minimal and there is nothing in his behavior that would distinguish it from the behavior of one who believes community funds are being used to buy a community asset. Accordingly, the trial court finding that Husband intended to make a gift of the value of the replacement ring derived from community funds is not supported by substantial evidence. Wife’s statement that the ring “was a gift” is a conclusory statement that does not address the element of donative intent and, therefore, does not constitute substantial evidence showing Husband intended to make a gift.

In addition, there is insufficient evidence in the record to support a finding of actual or symbolic delivery of the ring from Husband to Wife. (See Civ. Code, § 1147 [verbal gift is not valid without actual or symbolic delivery.]) A ring is a tangible object capable of being physically delivered. Here, there was no actual delivery of the ring from Husband to Wife. Her testimony establishes that she went to Sacramento without

⁸ Accordingly, we reject Wife’s argument that this is a typical he said, she said situation to be resolved by the trier of fact. The parties’ testimony does not conflict about what Husband said to Wife about the ring.

Husband, selected which ring to buy, paid for it, and took possession from the jeweler. As to symbolic delivery, nothing in Wife's testimony addresses that alternative.

Accordingly, the trial court's determination that the entire value of the replacement ring was a gift is not supported by the evidence—specifically, the elements of donative intent and actual or symbolic delivery are missing. Therefore, Wife should have been required to reimburse the community for the \$12,500 in community funds used to acquire the replacement ring.

F. 118 River Pointe

1. *Background*

Husband's parents, John and Mary Peters, owned an unencumbered rental property located on Sassafras Drive in Madera. His parents sold the Sassafras property for \$219,000 and the escrow closed in November 2003. Wife was the parents' real estate agent for the sale and received a reduced commission.

Around that time, Wife was working with DMP Development Corporation selling condominium units in the first phase of a development project. Wife had the idea of buying the condo at 118 River Pointe and living there while she and Husband built a home on Via Cerioni. Wife thought it would be a good investment and could be passed to their daughter. As a result, Husband and Wife reserved unit 118 River Pointe, one of the last available in the small first phase of the development.

Wife testified that Husband talked her into having his parents buy 118 River Pointe, with the arrangement that Husband and Wife could live there during the construction of their home on Via Cerioni. From his parent's perspective, their acquisition of 118 River Pointe could be treated as an Internal Revenue Code section 1031 exchange if completed within 45 days of the sale of the Sassafras property. Such an exchange would save his parents paying taxes on the capital gains from the sale of the Sassafras property.

On October 29, 2003, Wife drew up the contract for the sale of 118 River Pointe to Husband's parents and they signed a document labeled "CARMEL HOME NOTICE, DISCLOSURE and DISCLAIMER." On October 30, 2003, Husband's parents placed a \$3,000 deposit on 118 River Pointe. The receipt for the deposit stated the parties agreed the list price for the home was \$187,638.80. The sale to Husband's parents did not proceed because Mike Pistoresi, a principal of DMP Development, thought Husband and Wife were buying the property (they had reserved it) and he was willing to sell it to Husband's parents only if Husband and Wife also were on the title. Wife explained this to Husband, who called his parents and explained it to them. Wife testified that Husband's parents were comfortable having Husband's and Wife's names on the title. As a result, Wife prepared a contract that included Husband and Wife.

In March 2004, the sale of 118 River Pointe closed. Husband's parents paid for the purchase. The grant deed stated title was taken by "John N. Peters and Mary Peters, husband and wife, as Joint Tenants, as to an undivided 1/2 interest; and Kurt A. Peters and Teddi R. Peters, husband and wife, as Community Property with Right of Survivorship." Husband and Wife signed a separate page stating they accepted the transfer of the real estate as community property with right of survivorship. The parties disagreed about whether their inclusion on the title was conditional and whether Wife agreed that she would later remove their names from the deed. Neither of Husband's parents testified.

The trial court believed Wife's version and found that Husband and Wife, "together, hold a 50% ownership interest in 118 River Pointe." At the time of trial, the court found (1) the fair market value of 118 River Pointe was \$189,000; (2) no debt encumbered the property; and (3) the value of the community property interest in the property was \$94,500. The court assigned the community's entire one-half interest in the property to Husband at the value of \$94,500.

The trial court rejected Husband's argument that he and Wife did not have an ownership interest in 118 River Pointe, because they never paid anything for it, by essentially concluding that they contributed to the purchase by finding that while Husband and Wife resided at the condominium, (1) Husband gave up \$850 per month in wages for his work at his parent's carwash, (2) Wife applied her sales commission to improvements (appliances and upgrades) to condominium, and (3) the parties paid property taxes, insurance, association dues, water bills and utilities.

2. *Wife's Fiduciary Duty as Real Estate Agent*

Husband contends the trial court committed a legal error by determining "that Evidence Code section 662⁹] created a presumption [of legal ownership by Husband, Wife, and Husband's parents] without first dealing with Wife's breach of a fiduciary duty." Husband restates this contention by asserting the court committed legal error by not requiring Wife to first rebut a presumption of undue influence.

The legal analysis set forth in the trial court's statement of decision quotes Evidence Code section 662 and describes the burden of rebutting it. Next, the court stated that the parties did not dispute that Wife was a real estate agent and owed fiduciary duties to John and Mary Peters in connection with the sale of 118 River Pointe. The court explicitly found "there was no fraud or other impropriety in the transfer of title." In addition, the court explicitly addressed Husband's testimony that he and Wife had a verbal agreement whereby she would take their names off title later. The court stated this testimony directly contradicted Husband's response of "None" to an interrogatory asking if there were any agreement between him and his spouse, made before or during marriage, affecting the disposition of assets in this proceeding. The court also noted Husband's position that his parents always believed that title had been transferred back to

⁹ This section provides in full: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."

them was not consistent with the documentary evidence. The court referred to a grant deed (trial exhibit 132) signed by John and Mary Peters in August 2005 to transfer their undivided 50 percent interest in 118 River Pointe to the family revocable living trust and a subsequent grant deed (trial exhibit 133) signed by them in January 2014, transferring the interest from the December 2004 family revocable living trust to their new family trust dated January 13, 2014.

The trial court's findings that (1) there was no fraud or other impropriety in the transfer to title to Husband and Wife and (2) there was no agreement whereby Husband and Wife's name would be removed from the recorded title, are sufficient to resolve Husband's claim that Wife breached a fiduciary duty owed to his parents. Stated another way, these findings establish that Wife did not exercise any undue influence over Husband's parents. As to Husband's argument that the trial court was required to complete its analysis of Wife's fiduciary duties before considering the presumption created by the recorded title, we conclude the purportedly improper sequence in the analysis was, at most, harmless error. The trial court's findings of fact are supported by the evidence found credible by the court. Also, the court's determination that Husband's testimony was not credible withstands scrutiny under the standard of review applied to credibility determinations. (See *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1043 [trier of fact is free to disbelieve a witness if there is any rational ground for doing so]; Evid. Code, § 780 [factors relevant to a witness's credibility].) Therefore, we reject Husband's argument that the trial court committed legal error in dealing with his claim that Wife breached a fiduciary duty owed to his parents in connection with the sale of 118 River Pointe.

3. *Joinder of Husband's Father*

Husband contends the trial court committed legal error by not joining Husband's father. Wife contends Husband waived this argument by not raising it in the trial court

and, moreover, the joinder of John Peters was unnecessary.¹⁰ Husband's reply brief does not directly address Wife's contention that he did not raise the issue of joinder in the trial court. Instead, his reply brief states: "It is unclear to what specific issue Wife is alleging was waived: however, it is clear this argument is a red herring as Husband clearly objected throughout the hearing by providing a proposed order and objecting to the court's tentative statement of decision thereby preserving [his] rights on appeal."

We have reviewed Husband's objections to the proposed decision. Those objections make no reference to the failure to join John Peters in the proceeding. Furthermore, our independent review of the record has located no request asking for the joinder of John Peters in the proceedings, whether made by Husband, John Peters or someone stating they had been granted a power of attorney from John Peters. Therefore, we will not consider whether the trial court committed legal error on an issue that was not presented to it. (See *Woodridge Escondido Property Owners Assn. v. Nielsen* (2005) 130 Cal.App.4th 559, 574 [issues not raised in the trial court ordinarily are deemed waived]; *In re Christopher S.* (1992) 10 Cal.App.4th 1337, 1344 [procedural errors not raised in the trial court may not be raised at the appellate level].)

G. Fiduciary Duty to Collect Rent

1. *Background*

After Husband and Wife moved from 118 River Pointe, the condominium was rented to third parties. Based on its findings that Husband and Wife owned one-half of 118 Pointe West, the trial court determined they had a right to rent that was proportional to their ownership stake in the property. The court found the net monthly rent from the condominium had been at least \$580. The court noted there was evidence the rents were paid through the nursery to Husband's parents and the community did not receive any share of the rental proceeds during the marriage. The court concluded that, pursuant to

¹⁰ Mary Peters died in April 2015, before the start of the trial.

section 1101, Husband was liable for breach of fiduciary duty because he allowed all the rental proceeds to go to his parents, thus depriving the community of its interest. The court also concluded Wife was entitled to one-half of the community interest in the rents and calculated the community interest at \$38,320 (one-half of \$580 per month times 132 months).

Husband contends the trial court's ruling that he breached his fiduciary duty to Wife by failing to keep 50 percent of the rent paid on 118 River Pointe is not supported by substantial evidence. Husband asserts "[t]he only evidence introduced was that Husband did not believe he or Wife had an ownership interest in 118 River Pointe and even Wife testified she never gave any thought to being entitled to the rent."

Wife contends Husband has overlooked the evidence in the record relating the amount of rent and Husband's collection of those rents from the tenant who would come by the nursery to pay the rent and obtain a receipt. Wife argues that Husband's theory that any failure to perform a duty was "unwitting" is unsound legally because a breach of fiduciary duty does not require an intentional act.

2. *Legal Principles*

Section 1101, subdivision (a), provides that a spouse has a claim against the other spouse for any breach of fiduciary duty that results in the impairment to the claimant spouse's present undivided one-half interest in the community estate. Such claims may reach a series of transactions that have caused a detrimental impact to the claimant spouse's interest in the community estate. (*Ibid.*) Remedies for breach of the fiduciary duty by a spouse shall include an award to the other spouse of an amount equal to 50 percent of any asset transferred in breach of the fiduciary duty plus attorney fees and court costs. (§ 1101, subd. (g).) "The fiduciary duty with respect to marital property is designed, among other things, to preserve that one-half interest." (*In re Marriage of Simmons* (2013) 215 Cal.App.4th 584, 593.)

Section 1100 addresses the management and control of community personal property. Except as provided by statute, either spouse has an absolute power of disposition of community personal property. (§ 1100, subd. (a).) This absolute power of disposition is restricted by subdivision (b) of section 1100, which states that “[a] spouse may not make a gift of community personal property, or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse.” Pursuant to subdivision (e) of section 1100, when managing or controlling community assets and liabilities, spouses must act towards one another in accordance with the general rules governing fiduciary relations as specified in section 721.

3. *Substantial Evidence Argument*

As discussed earlier, the trial court did not err when it determined Husband and Wife owned an undivided one-half interest in 118 River Pointe. (See pt. II.F., *ante*.) This determination provides an adequate foundation for the conclusion that Husband and Wife also held an ownership interest in one-half of the net rents generated by the condominium. (See *Garcia v. Venegas* (1951) 106 Cal.App.2d 364, 369 [person with an undivided one-half interest in real estate was entitled to one-half of the rents, issues and profits from the real estate].)

Husband testified that some of the rent for 118 River Pointe was collected at the nursery. Husband stated, “Usually he’ll come by and make a purchase, or pay it, and we give him a receipt for my dad and mom.” He also said that “when [rent] comes through our facility, we put it in another envelope. I’m not there 24 hours taking rent. I do other stuff too. If my people took it in, they give [the tenant] a receipt of the amount, whatever they give, the month they paid for. It goes underneath the cash box. The cash box usually goes to my parents’ home when my mom was alive.” Husband’s testimony constitutes substantial evidence that sometimes rent for the 118 River Pointe property was paid through the nursery and all of the rent received there was transferred to

Husband's parents. Husband has cited no evidence in the record contradicting the finding that none of the rent was retained by Husband, either for himself or for the community.

Accordingly, we reject Husband's argument that substantial evidence did not support the determination he breached a fiduciary duty with respect to the rent from 118 River Pointe. In his reply brief, Husband expands upon his position by arguing he acted in good faith at all times as he believed the house purchased *entirely* with his parent's money was his parent's property and, therefore, the money was also his parents. This argument contradicts the trial court's finding that Husband and Wife provided value for the property when Husband did not collect wages from the carwash and Wife put her commission back into the property. While this contribution by Husband and Wife appears to be less than 10 percent of the cost of the condominium and Husband might have reasonably believed the contribution was rent rather than an equity investment, the trial court's findings as to the credibility of Husband's testimony in deciding the ownership of 118 River Pointe preclude us from inferring that he acted in good faith—a finding the trial court did not make and the absence of which was not challenged by Husband in his objections to the tentative decision.

H. Commission on Sale of 26 Pointe West

1. *Facts*

The parties sold 26 Pointe West in November 2003 for \$450,000. The parties used \$425,000 of the proceeds for the construction of the family residence on Via Cerioni. Prior to the marriage, Husband owned 26 Pointe West as his separate property. During the marriage, the parties made improvements to 26 Pointe West using monies from their joint bank account. The trial court found the community improvements contributed \$200,000 to the fair market value of the home. As a result, the court attributed \$200,000 of the \$450,000 sale proceeds to the community improvements.

Wife handled the sale of 26 Pointe West and did not receive her regular 5 percent commission. If a 5 percent commission had been paid, it would have equaled \$22,500 (5 percent of \$450,000) and would have been community property as it resulted from Wife's efforts during the marriage.¹¹ Due to the absence of a commission on the sale of 26 Pointe West, the trial court considered \$22,500 of the sale proceeds to be community property.

The trial court then addressed the respective interests in the proceeds from the sale of 26 Pointe West used in the construction of a new home on Via Cerioni. Sale proceeds of \$425,000 were utilized for the construction. The court added the unpaid commission amount of \$22,500 to the \$200,000 in community improvements and concluded the community held a 49.44 percent interest in the sale proceeds (\$222,500 divided by \$450,000). Based on this calculation, the court found Husband held the remaining 50.56 percent as his separate property. As the parties used \$425,000 for the construction of the home on Via Cerioni, the court found Husband had a claim for reimbursement of \$214,880 (\$425,000 times 50.56 percent).

2. *Community Gained an Interest in Sale Proceeds*

Husband contends the trial court erred in determining the community was entitled to a 5 percent commission on the sale of 26 Pointe West. Husband states California law provides that the community may gain an interest in (1) a spouse's separate property where community funds pay principal owed on debt secured by the property or (2) a spouse's separate property business through the skill, labor and efforts applied by the spouse during the marriage. In contrast, Husband asserts no case has ever found the skill, labor and effort of a spouse that does not add value to separate property can create a community interest in said separate property. Based on this view of the law, Husband

¹¹ In *Holloway v. Showcase Realty Agents, Inc.* (2018) 22 Cal.App.5th 758, the husband obtained "a community property interest in his wife's real estate commission for facilitating the sale" of a property in Boulder Creek, California. (*Id.* at p. 762.)

contends “Wife’s efforts as a real estate agent did [not] pay down a non-existent mortgage or increase the value of the house” and, therefore, the community did not acquire an interest in his separate property share. As explained below, we reject Husband’s arguments and conclude the trial court did not err in characterizing a portion of the sale proceeds as community property because of Wife’s efforts in selling 26 Pointe West.

First, we conclude the trial court’s findings as to historical facts (i.e., the basic who, what, when, where, how and why) are supported by substantial evidence. Wife testified that the standard commission in the industry in 2004 was 5 percent. As 26 Pointe West was sold in November 2003, the trial court could reasonably infer a 5 percent commission was standard at that time also. (Cf. *In re Marriage of Denny* (1981) 115 Cal.App.3d 543, 552 [affirmed trial court’s use of a 6 percent real estate commission in calculating the fair market value of family residence and wife’s one-half share of that value].) The fact that Wife accepted a reduced commission on sales involving family members, such as the 3 percent “selling broker fee” on the sale of the Sassafras Drive property for Husband’s parents, did not compel the trial court to use of a smaller percentage when calculating the value of Wife’s efforts in selling 26 Pointe West.

Second, the fact that Husband and Wife did not explicitly agree to paying the community a commission based on Wife’s efforts, and never discussed the rate of such a commission, does not operate as a legal bar to the characterization of the 5 percent of the sale proceeds as community property. As a general rule, “all property ... acquired by a married person during the marriage while domiciled in this state is community property” (§ 760), including the fruits of both spouses’ “expenditures of time, talent, and labor” (*In re Marriage of Dekker, supra*, 17 Cal.App.4th at p. 850.) Here, the property acquired during the marriage was the sale proceeds of \$450,000. It was reasonable for the trial court to apply the general rule to the sale proceeds and find a portion of those funds were the fruits of Wife’s expenditure of talent and labor in facilitating the sale. The failure of

the parties to locate a case specifically stating that when a real estate agent spouse handles the sale of the family residence, without taking a commission on the sale, does not prevent a trial court from (1) applying the general rule of law about the fruits of a spouse's time, talent and labor being community property and (2) finding a portion of the sale proceeds are attributable to the spouse's time, talent and labor. Accordingly, we reject Husband's argument that the trial court committed legal error by characterizing a portion of the sale proceeds as community property based on Wife's efforts as a real estate agent.

3. *Math Error in Allocating Commission to Separate Property Share*

Husband argues that, assuming the community was entitled to a 5 percent commission in the sale proceeds from 26 Pointe West, the trial court abused its discretion by charging the commission entirely to his separate property share. We agree.

Of the sale proceeds of \$450,000, the community was assigned a \$200,000 interest based on improvements and Husband was assigned a separate property interest of \$250,000 based on his original ownership of the property. A 5 percent commission on the total sale proceeds equals \$22,500, of which \$10,000 is attributable to the \$200,000 community property interest and \$12,500 is attributable to Husband's \$250,000 separate property interest. Awarding a community property commission on the community property share does not change the character of that share—it was community property before the commission and it was community property after the commission. The same cannot be said of charging a community property commission to Husband's separate property share. The amount of the commission attributed to the separate property share would become community property, thereby reducing the separate property share and increasing the community property share. Here, a 5 percent commission on Husband's separate property share of \$250,000 equals \$12,500. Subtracting this amount from his separate property share and adding it to the community property share decreases

Husband's \$250,000 interest to \$237,500 and increases the community property share to \$212,500.

The trial court erred because it subtracted the entire commission (\$22,500) from Husband's separate property share and added it to the community property share. In effect, the trial court made Husband pay the entire commission instead of allocating it between the community property share and Husband's separate property share. This was an abuse of discretion as there is no reasonable basis for attributing the entire commission to Husband's share of the proceeds.

A proper allocation of the 5 percent commission increases the \$200,000 community property share by \$12,500 to \$212,500 and reduces Husband's \$250,000 separate property share by \$12,500 to \$237,500. Accordingly, the trial court erred when determined the community property share of the proceeds was \$222,500 and divided this amount by \$450,000 to calculate the community's pro tanto interest in sale proceeds at 49.44 percent. The correct calculation divides the community property share of \$212,500 by \$450,000, which equals 47.22 percent (rounded off). The remaining 52.78 percent was Husband's separate property share of the \$450,000 in proceeds. Accordingly, Husband's share of the \$425,000 of the sale proceeds used to build the home on the Via Cerioni property equals \$224,305.56 (i.e., 52 and 7/9ths percent of \$425,000), not the trial court's determination of \$214,880 (i.e., 50.56 percent of \$425,000).

In summary, Husband must be reimbursed \$224,305.56 to compensate him for the separate property funds that were used to build the home on Via Cerioni. On remand, his equalization payment should be calculated using this figure instead of \$214,880.

I. Watts Charge for Home and Vehicle

Pursuant to *In re Marriage of Watts* (1985) 171 Cal.App.3d 366 (*Watts*), Husband sought reimbursement for Wife's exclusive postseparation use of the residence on Via Cerioni and a 2011 Cadillac Escalade. Where one spouse has exclusive use of a

community asset during the period between separation and trial, that spouse may be required to compensate the community for the reasonable value of its use. (*Id.* at p. 374; *In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 978.) This compensation is commonly referred to as a “Watts charge.” (*In re Marriage of Falcone & Fyke*, *supra*, at p. 978.)

The trial court’s tentative decision stated the court granted Husband’s request, found the fair rental value of the Via Cerioni residence was \$1,200 per month and determined Wife had sole use of the property for 33 months. Based on these findings, the court imposed a *Watts* charge of \$39,600 for Wife’s use of the residence. In addition, the tentative decision stated the court would charge Wife \$400 per month for her 33-month use of the 2011 Cadillac Escalade, which totaled \$13,200.

After hearing arguments on the parties’ objections to the tentative decision, the trial court issued its rulings on the objections and ordered counsel for Wife to prepare the final statement of decision and the judgment. The final statement of decision did not mention the *Watts* charges for the home and vehicle, which totaled \$52,800. Husband’s opening brief contends the trial court abused its discretion by including the *Watts* charges in its tentative ruling and removing those charges from its judgment. Husband requests this court to order the trial court to charge Wife with \$52,800 as originally intended under the tentative ruling.

Wife’s respondent’s brief states: “It does appear that the Statement of Decision inadvertently omitted the language granting [Husband’s] requested *Watts* charges. [Citation.] But it is a harmless omission. The ultimate equalization payment awarded by the Trial Court took into consideration the two *Watts* Charges included in the Tentative Decision. [Husband] does not contend otherwise.” The section in Husband’s reply brief addressing Wife’s assertions about the *Watts* charges contained only the following sentence:

“While it appears the final judgment inferentially included the *Watts* charges, as outlined *supra* and in the AOB, there are substantial issues with the judgment which require setting the judgment aside, not just the *Watts* charges.”

Other issues presented in this appeal require a remand for modification of the judgment. Accordingly, we will direct the trial court to ensure that the modified judgment reflects the *Watts* charge for Wife’s use of the residence on Via Cerioni and the Escalade.

DISPOSITION

The judgment is reversed and the matter remanded for modification of the judgment in a manner not inconsistent with this opinion. The modification of the judgment shall reflect that (1) the community is not entitled to reimbursement from Husband for the use of \$22,309.44 of community funds to pay property taxes and insurance expense related to 26 Pointe West; (2) Wife is not entitled to reimbursement of the \$17,594 in term life insurance premiums she paid from her separate property; (3) Wife shall reimburse Husband \$6,250 for his one-half of the community property interest in the replacement wedding ring and, after such reimbursement, the replacement wedding ring shall be Wife’s separate property; (4) Husband’s claim for reimbursement for funds used in the construction of the residence on Via Cerioni is \$224,305.56, not the \$214,880 determined by the trial court; and (5) Wife shall reimburse the community for her use of the residence on Via Cerioni and her use of the Escalade.

Husband shall recover his costs on appeal.

FRANSON, J.

WE CONCUR:

LEVY, Acting P.J.

MEEHAN, J.